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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 119

JAMES IVEY WYATT,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF

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Summary of Argument

The decision in *Hawkins* v. *United States,* 358 U.S. 74 requires a reversal in this case, because the denial of privilege pitted husband against wife. Nothing justified an exception to the general privilege rule.

The rationale of the necessity exception has been to protect the wife by giving her the right to testify against her wrong acting husband. An alternative rationale has been where one spouse commits a wrong against the other the premise (marital harmony) of the privilege is not present. Accepting either rationale leads to the conclusion that the privilege should have been allowed in this case.

I.

The Hawkins Rationale Is a Fortiori Applicable in This Case.

Every case of privilege involves a weighing of competing policies. In the field of spousal privilege a balancing must be made between the need to foster marital harmony and the need to produce all relevant evidence in court. Petitioner believes this Court in *Hawkins* v. *United States*, 358 U.S. 74 struck the balance in favor of marital harmony. This Court stated that nothing in reason or experience showed the common law rule should be overturned. After stating the basis of the privilege is the belief it fosters marital harmony the opinion went on to say: "Such a belief has never been unreasonable and is not now . . . " (p. 77).

In *Hawkins* the Government contended the wife was voluntarily testifying against her spouse. Here the wife was compelled to testify, meaning there is marital harmony which well may be preserved by the application of the privilege. The *a fortiori* implications of this argument are clear. The Solicitor General suggests we are treading over old ground when emphasizing the spouse was *compelled* to testify, and that *Hawkins* foreclosed such an argument (Br. 15-16). Petitioner is not asking this Court to create any distinction based on whether or not a spouse is compelled to testify, but rather has suggested the premise of the Necessity Exception is not present where the witness spouse refuses to testify. The Government is relying on the exception to the general rule and must give reasons for a departure which are compatible with notions of privilege. Rather than do this the Government has sought to narrow the privilege in terms of effectuating the Mann Act. Such an argument can be made in favor of limiting or abrogating

any type of privilege. Behind this argument there is only the unsupported assertion that convictions are difficult to secure without the testimony of the wife (Br. p. 14). No data is furnished to assist this Court in determining whether to modify the common law in the light of "reason and experience". The concurring opinion in *Hawkins* suggests empirical data ought to be examined to see if law enforcement is being crippled by the maintenance of the spousal privilege.[1]

The traditional scope of the Necessity Exception is logically consistent with and facilitates the policy considerations enunciated in *Hawkins*. Thus, such scope contemplates an existing failure of marital harmony, i.e., one spouse having acted wrongfully against the other; therefore, allowing adverse spousal testimony would not strike a discordant note. Here, where there is presumably a valid marital relationship, and where there have been no wrongs subverting such relationship, the traditional limits of the exception operate as a logical projection within the scheme of marital privilege.

We will now deal seriatim with the points raised in the Government's brief.

A. The Government places principal reliance upon two cases dealing with privilege in Mann Act cases: a district court case, *United States* v. *Williams*, 55 F. Supp. 375 and *Shores* v. *United States*, 174 F. 2d 838. The Government cites *Shores* as holding spousal testimony may be compelled in a Mann Act prosecution (Br. p. 7). While the court goes out of its way to state such testimony may be compelled, such was not the holding. The court said, "As a matter of fact, she did not refuse to testify, so as to require the

[1] *Hawkins, supra*, footnote No. 4 at page 82.

court to compel her to do so, but, even if she had, this would have made no difference" (p. 841).

While *Williams* does hold the privilege may not be asserted, where the marriage took place before the offense, there is authority of equal weight which is contra: *United States* v. *Gwynne*, 209 Fed. 993. The *Williams* opinion would appear to be unsound in the light of *Hawkins, supra*, since Williams, among other things, relies on the potential frustration of Mann Act prosecutions.[2] That case also misapprehends the nature of the necessity exception.

B. The Government suggests that Petitioner relies upon state cases holding that the woman has condoned the offense by subsequently marrying the man. We certainly have not based our case on any theory of condonation, but rather have attempted to show there is no basis for an exception to the rule of privilege where the marriage occurs after the offense. Condonation in the law of crimes has an extremely limited application.[3] Among the state cases cited in the Petitioner's Opening Brief was one involving attempted murder which crime certainly could not be defended on the basis of condonation.[4] Petitioner believes it is important to avoid confusing the policy questions underlying the substantive and procedural questions, i.e., Mann Act and evidentiary rules. The Government appears to have confused the questions when it contends the privilege

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[2] *Williams, supra*, page 378.

[3] *Wharton's Criminal Procedure*, p. 268, states: "It is generally no defense that after the commission of an offense the victim condones or ratifies the offense . . . It is frequently stated that a criminal prosecution is barred when the victim . . . condones [offense] . . . if the injury is purely personal to the party affected, but not when the crime is also against the public such as . . . rape . . . or public scandal . . . "

[4] *People* v. *Johnson*, 9 Cal. App. 233, 98 Pac. 510, cited at p. 11.

ought to be narrowed to facilitate Mann Act prosecutions and continues to confuse the questions when it suggests Petitioner is relying on a condonation theory. We agree the wife cannot "condone" a Mann Act violation—no more than she can condone an attempt on her life. But we are dealing here with the question of whether she may be compelled to testify against her husband where the marriage occurred after the offense.

C. It is contended Mann Act prosecutions will be hampered if this case is decided in favor of privilege. Congress has in the past, where it has seen fit, modified the common law to facilitate a legislative objection. As was alluded to in *Hawkins,* husbands and wives may testify against each other in bigamy, polygamy or unlawful cohabitation cases. The same is true in importing aliens for immoral purposes.[5]

D. The Government states "we believe" the necessity exception in Mann Act cases rests on the ground of "necessity" to effectuate legislative intent (Br. p. 13). This assertion is made after suggesting the common law exception is not adequately explained in terms of necessity to protect the wife. Of course, the exception is a distillation of many cases, but it is submitted the pervading idea from *Lord Audley's Case,* 3 How. St. Tr. 401, through *Bentley* v. *Cooke,* 3 Doug. 422, and *Wigmore*[6] and the Mann Act cases such as *United States* v. *Mitchell,* 137 F. 2d 1006 has been the necessity of protecting the wife, and not the "necessity" to secure convictions. As Lord Mansfield said in *Bentley* v. *Cooke, supra*:

> "That necessity is not a general necessity, as where no other witness can be had, but a particular necessity,

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[5] *Hawkins, supra,* see p. 78.

[6] *Wigmore,* Evidence (3rd Ed.) Vol. 8, §2239.

as where for instance the wife otherwise be exposed without remedy to personal injury."

Wigmore suggesting an alternative theory to protecting the wife says:

> " . . . it is worthwhile to observe that the common-law cases and the statutory rules, applying the exception, are also equally open to explanation as instances in which the very reason for the privilege—at least the reason most frequently advanced . . . is lacking . . . the promotion of marital peace, and the apprehension of marital dissension . . . " (§2239 at pages 251 and 252).

Even this alternative theory would support Petitioner's position, i.e., marital harmony presumably exists where the marriage occurred after the offense; therefore, there is no reason to make an exception to the general rule.

The Mann Act cases have applied the exception in terms of necessity to protect the wife, rather than on the basis of facilitating convictions:

> "After all, the situation of the injured wife deserves some consideration; and in circumstances such as are here presented, we think it would be shocking to deny her the *right* to testify" (emphasis added) *United States* v. *Mitchell, supra*, p. 1009.

E. The Government quixotically suggests the basic purpose of the Mann Act was "to protect women who were weak from the men who were bad" (Br. p. 13). Obviously, such a characterization of the Act is less than comprehensive, and should not control the resolution of the problem at bar. The Mann Act deals with a social problem, as does the privilege. Marital harmony as a positive social value ought not to be subverted to "White-slave" law enforcement.

CONCLUSION

It is respectfully submitted that the common law (privilege and exception) should be reaffirmed, and that the judgment be reversed.

Respectfully submitted,

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